(1)

88-275

No. 88-

In the Supreme Court of the United States

OCTOBER TERM, 1988

WHITE INDUSTRIES, INC., CARTHAGE AIRWAYS, INC. and EUGENE INGRAM,
Petitioners,

vs.

THE CESSNA AIRCRAFT COMPANY and CESSNA FINANCE CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. UNDER THE ROBINSON PATMAN ACT, ARE DISTRIBUTOR SALES TO PERSONS WHO ARE UNAUTHORIZED DEALERS NOT IN COMPETITION AS A MATTER OF LAW EVEN THOUGH AUTHORIZED DEALERS ARE IN FACT IN COMPETITION WITH DISTRIBUTORS FOR SUCH SALES?

2. UNDER THE ROBINSON PATMAN ACT, WHAT IS THE PROPER STANDARD FOR DETERMINING IF AFFILIATED COMPANIES SHOULD BE TREATED AS ONE ENTITY FOR THE PURPOSE OF IMPOSING LIABILITY?

3. UNDER SECTION 1 OF THE SHERMAN ACT, 15 U.S.C. 1, DO SPECIAL DISCOUNTS, REBATES, FINANCING AND TERMS AND CONDITIONS OF SALE AGREED UPON AND GRANTED TO ONLY ONE OF ITS TEN DISTRIBUTORS AND TO NONE OF ITS DIRECT DEALERS BY A COMPANY WHICH IS BOTH A MANUFACTURER AND DISTRIBUTOR OF AIRCRAFT, CONSTITUTE A HORIZONTAL COMBINATION, CONTRACT OR CONSPIRACY IN RESTRAINT OF TRADE?

a. Is application of the law concerning vertical conspiracy applicable to this case?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the final order of the United States Court of Appeals, Eighth Circuit, 845 F.2d 1497 (May 6, 1988), which affirmed the judgment of the District Court for the Western District of Missouri, 657 Fed. Supp. 687 (1987), dismissing the claims of White Industries, Inc., Carthage Airways, Inc., and Eugene Ingram against the defendants; and decertifying a plaintiff class of Cessna dealers that had been initially certified in October, 1973.

OPINION BELOW

The Opinion of the United States Court of Appeals, Eighth Circuit is reported as White Industries, Inc., et al. v. The Cessna Aircraft Company, et al., 845 F.2d 1497 (May 1988). That opinion is reproduced in the appendix which is included with this petition. (See Appendix A). Also included in the appendix is an opinion of the trial court entered on November 19, 1975. The trial court's opinions giving rise to the appeal can be found in 657 Fed. Supp. 687. The trial court's opinion will be supplied in a supplemental appendix.

JURISDICTION

The opinion of the United States Court of Appeals, Eighth Circuit, affirming the trial court's judgment in this case was entered on May 6, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1). This petition was filed within ninety days of the Eighth Circuit's order of judgment.

STATUTES INVOLVED

The pertinent provisions of the Robinson Patman Act, 15 U.S.C. sec. 13a, are as follows:

> ". . . It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such

commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ."

In addition, 15 U.S.C. sec. 1 states as follows:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . ."

STATEMENT OF FACTS

The Cessna Aircraft Company (Cessna) maintained a two-tier distribution system. It sold approximately 50% of its aircraft to ten "independent distributors" at a discount of 25% or 26% off suggested retail price. Independent distributors were supposed to sell aircraft to authorized Cessna dealers appointed by them. Cessna sold the remaining 50% of its output direct to dealers (called "zone dealers") appointed directly by Cessna, at a discount of 20% off suggested retail price. Cessna was thus both a manufacturer and a distributor in competition with independent distributors. The terms of the written dealer contracts for zone dealers and independent dealers was prepared by Cessna and contained essentially

the same terms and conditions. The contracts required authorized dealers to make certain purchases and perform a number of duties including such things as performance of warranty work, maintenance of a stock of spare parts, provision of service facilities, maintenance of a certain number and quality of employees, and maintenance of a fleet of demonstrator aircraft.

During the relevant period of time, there were also in the aircraft industry persons referred to as "fixed based operators" (F.B.O.'s). The operation of F.B.O.'s range from little or no facilities to full service facilities which provided gas, repair, tie-down, aircraft rental and aircraft sales. These F.B.O.'s commonly purchased aircraft for their own use and for resale from Cessna dealers and Cessna distributors, without meeting the requirements of the Cessna franchise agreement. Some F.B.O.'s like Ray Horridge operated as a broker without airport facilities. As such he acquired aircraft from distributor Walston at the same time he purchased services and attempted to purchase aircraft from White Industries.

White Industries, Inc., an authorized (zone) dealer during 1968 and 1969 and Eugene Ingram, an authorized independent dealer and authorized zone dealer at various times in the period 1968 to 1974, alleged that independent distributors sold Cessna aircraft to persons who were not authorized Cessna dealers at prices at or below dealer net price and thereby caused Defendants to violate Section 2(a) and 2(f) of the Robinson-Patman Act.

One of the issues for trial as framed by the trial court in its Order of November 19, 1975 (Docket No. 130) was ". . . whether the Cessna franchise dealers and inde-

pendent wholesale distributors competed for the same customers and thus on the same functional level."

There was actual competition between independent distributors and dealers for sales. That competition was observed by the highest managers of the Cessna Aircraft Company, but Cessna took no action to prevent it. Studies by Cessna's own dealer Pennant Aviation, attribute low gross profit on sales to distributed competition. Former distributor, principal, Vincent DeScoise, testified at length about "retail sales" made by his distributor D.A.D. Mr. DeScoise testified that all dealers of Cessna Aircraft in the United States competed with each other and with Walston.

The record clearly shows direct competition between White Industries and Walston for sales to Roy Horridge. Horridge and the companies with which he was affiliated, Kaw Investment and Mid-Continent Aviation, purchased aircraft from Walston (Southaire). Horridge bought from Walston not from White because he could purchase less expensively from Walston and could then resell at a lower price than could White.

The largest of the independent distributors was a group of distributors owned by Walston Aviation, Inc. and referred to as "Walston" or the Walston group. Walston accounted for nearly 25% of the total sales of Cessna aircraft. (Appendix C).

Undisputed evidence from the former Senior Vice President of the Cessna Aircraft Company shows that there was overproduction by Cessna in most of the relevant time period; that the overproduction overloaded the entire distribution system; that planes had to be gotten rid of to make way for next years models and that Cessna

agreed with Walston to give Walston special discounts, rebates and financing not made available to other distributors. New model introduction was facilitated by getting rid of the previous years models. Once new models were introduced, dealers were required to purchase new model demonstrators pursuant to the terms of their franchise contracts. New model introduction dates were changed from year to year in the sole discretion of Cessna. The effect of these special discounts and financing arrangements with Walston was to allow the introduction of new models at an artificially higher price and would have prevailed had there been an oversupply of aircraft on the market. Petitioners' economic expert testified that the agreements between Cessna and Walston allowing Walston to purchase aircraft at a price below that which Cessna zone dealers could sell similar Cessna aircraft, resulted in economic damage to the Petitioners.

REASONS FOR GRANTING WRIT

I.

No Appellate Court Has Dealt Squarely With The Issue Of Whether An Unauthorized Dealer Or Broker Who Is A Customer And Competitor Of Authorized Dealers May Purchase Products From A Favored Buyer (Distributor) Without Violating The Robinson Patman Act

Petitioner has consistently maintained throughout this litigation that sales of aircraft by Cessna distributors to unauthorized dealers or brokers are violations of the Robinson Patman Act if it could be shown that unauthorized dealers or brokers were actual or potential customers of authorized dealers. The Cessna defendants raised this issue (called the FBO theory) on numerous occasions throughout the pendency of the litigation. One significant occasion resulted in the following order from the Honorable William H. Becker on November 19, 1975:

". . . II. The F.B.O. Theory.

In Cessna Aircraft Corporation's system of distribution, Cessna sold both directly to Cessna franchised retail dealers and to independent wholesale distributors. Cessna did not sell directly to non-franchised fixed base operators. The independent wholesale distributors are alleged to have sold both to Cessna franchised retail dealers and to non-franchised fixed base operators (hereinafter "F.B.O.'s"). Cessna contends that because the Cessna franchised dealers and the F.B.O.'s both sell retail, the independent wholesale distributors must be on a different functional level than

the Cessna franchised dealer and thus may be charged a lower price than that charged franchised dealers without violation of 2(a). Cessna cites cases which recognize the legality of price differentials which reflect functional differences in the chain of distribution.

Plaintiffs contend that because Cessna did not sell to F.B.O.'s, in fact the Cessna franchised retailers and the independent wholesale distributors were in competition for sales to the F.B.O.'s and therefore competed on the same functional level. Plaintiffs do not take issue with the proposition that price differentials can be justified by functional differences.

The real issue is thus a factual one - whether the Cessna franchised dealers and the independent wholesale distributors competed for the same customers and thus on the same functional level. When the issue is so framed, it is apparent that there is no legal issue ripe for an early determination. Plaintiffs should be given an opportunity to utilize discovery to develop the facts concerning competition for sales to F.B.O.'s."

Subsequent to this order, the Cessna defendants moved for an order allowing an Amicus Curiae in *J. Truett Payne Company v. Chrysler Motors Corporation*, 451 U.S. 557, 101 S.Ct. 1923, 68 L.Ed.2d 442 (1981). In that motion, the Cessna defendants made the following statements at page v:

". . . The principal allegation is this litigation relates to Cessna's 'dual' distribution system during the relevant period. In certain areas of the country, Cessna sold aircraft through its own zone officed to contracted retail dealers ('zone dealers'). In other areas of the country, Cessna sold aircraft to independent wholesale

> distributors who, in turn sold to dealers. . . . In so far as Cessna can presently determine, plaintiffs allege approximately 3,100 such 'favored' aircraft sales to some 15 distributors and seek damages based on approximately 20,000 sales to approximately 1,500 class member dealers. These allegations involve aircraft of widely differing types ranging in price from $7,000 to $250,000 . . ."

Both Judge Becker's opinion and Cessna's position become significant when compared to the ultimate conclusions of law of the Honorable Ross T. Roberts, deceased and the opinion of the Eighth Circuit about which this writ is sought. Judge Roberts eliminated all but 29 of the favored sales primarily of the basis that most of the remaining sales were potentially to non-authorized dealers and were excluded as a matter of law. This conclusion was made in the face of undisputed evidence that one non-authorized dealer, Roy Horridge, was in fact a customer of petitioner White Industries, Inc. and of distributor Walston.

The Eighth Circuit at pages five and six of its opinion succinctly crystalizes the competition issue:

> "A review of the evidence of distributor-dealer competition that White proffers on appeal confirms that White and the District Court are proceeding on very different legal approaches to the concept of functional competition under 2a. White argues that any distributor sale to an entity 'which is not an authorized Cessna dealer' constitutes a sale in competition with zone dealers like White. Under the District Court's analysis, distributor sales to independent unauthorized dealers occurred at the distributor's proper functional level, and so such sales were not treated as competitive with dealers, whose function was to sell to end-users.

We agree with the District Court's analysis. Nothing in the Robinson-Patman Act compels a manufacturer like Cessna to impose a vertical restraint on its wholesalers' sales to limit them to 'authorized' or contracted dealers. See 5 Von Kalinowski, Anti trust Laws and Trade Regulations, art. 30.02(2)(a) (1988). Dealers like White who desire to compete in selling to other dealers will of course suffer a cost disadvantage compared with distributors, but to hold that the larger distributors' discount violates art. 2(a) in this circumstance would effectively abolish two-channel distribution systems in all industries. footnote 4. White cites no authority for this extraordinary interpretation of the Act, nor can we find any.

Footnote 4. White places a great deal of emphasis on its loss of the business of independent dealer Roy Horridge to distributor Walston. If Horridge had been an end-customer, this diversion would clearly have violated the Act. As a dealer, however, Horridge appears to be precisely the kind of purchaser that distributors legitimately cater to.

White objects that Horridge buys planes at the same price as White, while Horridge bears none of the costly burdens imposed on authorized Cessna dealers, like maintenance of a showroom, purchase of demonstrator aircraft, etc. Whatever the merits of White's complaint about the unfairness of independent dealers with lower overhead buying the same commodities for the same price as authorized dealers, it is clear that §2(a) does not prohibit this result. The Robinson-Patman Act proscribes discriminatory pricing, not pricing which fails to discriminate be-

tween dealers with unequal costs at the same level of distribution. Moreover, the burdens that Cessna's dealership agreement imposed on White presumably were matched by commensurate economic benefits. One may reasonably expect that authorized dealers with showrooms and other customary trappings of authorized status will be able to attract more customers interested in a stable, long-term relationship.

Finally, White makes much of the fact that Horridge had once been a customer of White's. This fact does not establish functional competition between White and the distributor who ultimately undersold White. In general terms, a retailer who manages for a time to sell to another retailer does not thereby establish competitive injury from the wholesaler to whom his retailer-customer ultimately takes his business."

The Eighth Circuit observation that "If Horridge had been an end-user, this diversion would clearly have violated the Act" emphasizes the importance of the finding to petitioners and to class member dealers. Petitioners' interpretation of the Act was based upon the law of the case as ordered by Judge Becker on November 19, 1975 and upon a reading of the Act itself.

The words "retail" and "end user" simply are not found in the Act. In addition the cases uniformly conclude that the issue is whether the favored and non-favored purchasers are in competition. Since Cessna does not treat non-authorized dealers or brokers as being within the distribution no risk is imposed on two tiered distribution systems if this court reverses the Eighth Circuit.

An analysis of 5 Von Kalinowski art. 30.02(2)(a) reveals that the article supports the position of petitioner rather than the holding of the Eighth Circuit. Example 2 on page 30-37 and 30-38 sets forth circumstances where there is a violation of the Act when a distributor sells to both jobbers and dealers who also buy from jobbers. Authority for the example is *In the Matter of E. Edelmann & Company*, 51 F.T.C. 978 (1958), aff'd 239 F.2d 152 (7th Circuit 1956), *cert. denied*, 355 U.S. 941, *rehearing denied*, 356 U.S. 905 (1958). The 7th Circuit in *Kirby v. Mallory*, 480 F.2d 904, 909 (1973) emphasized that "a functional analysis is necessary to determine whether customers are in fact competing on the same distribution level . . . and that traders whatever their designations, who compete at the same level must be granted the same discount. . . ." See *F.T.C. v. Simplicity Pattern Co.*, 360 U.S. 55, 62-63, 79 S.Ct. 1005, 3 L.Ed.2d 1079 (1959) and *F.T.C. v. Rubberoid Co.*, 343 U.S. 470, 72 S.Ct. 800, 96 L.Ed. 1081. A reading of the introduction to the Von Kalinowski section relied upon by the Circuit Court demonstrates how the Court must give deference to those within the distribution system.

> ". . . The purpose of the graduated discount system was to compensate various marketing intermediaries for performing different distributive services or marketing functions. In deference to that traditional distribution scheme, the courts and the Commission generally have allowed sellers to charge different prices among customers at different levels of distribution. Those differentials, however, must correspond to the particular customer's position on the distribution ladder, so that a wholesaler or jobber must receive a higher discount (and therefore a lower price) than a dealer or retailer."

30.02(2)(a). In this case, F.B.O.'s and brokers are not even within the Cessna distribution system.

Further support of petitioner's position can be found in *Century Hardware Corporation v. Acme United Corporation*, 467 Fed. Supp. 350, 356 (E.D. Wisconsin, 1979) where the district court followed the criteria established in *Kirby, supra*, and found ". . . With respect to sales to schools, the plaintiff operates at the same level of distribution as do the distributors of school supplies. The character of the plaintiff's selling is no different from the character of the distributor's selling—indeed, they bid for the same sales contracts to schools. . . The plaintiff has established that it competes with the favored purchasers."

Clearly the holding of the Eighth Circuit is in conflict with the Seventh Circuit on the general proposition of criteria to be examined. The instant case is egregious when it is evaluated in the light of the circumstances of Cessna dealers. Cessna dealers' entire product line was at risk. It would be pointless to become a dealer if anyone who designated themselves as being in the aircraft business could purchase aircraft, parts, avionics and accessories at dealer net prices from any Cessna distributor regardless of the marketing or distributive service that he performed.

II.

The Holding Of The Eighth Circuit Is In Conflict With The Recognized Standards Of Treatment Of Distributors' Affiliated Companies In The Determination Of Robinson Patman Liability

The Eighth Circuit summarily rejected petitioners' position concerning distributors' affiliated companies. In so doing it applied the following test:

". . . The key question for Robinson-Patman purposes is whether the relationship between distributors and 'captive dealers' was so integrated that the subsidiary dealerships - which competed on the same functional level as the plaintiff - could be taken to have purchased the planes at the higher distributors' discount. White gives us no reason to reverse the District Court's findings of fact on this issue." Opinion, Appendix A pages A8-A9.

The proper test under which the evidence should have been evaluated would have to have been to have determined the degree of control that the parent had over the policies, objectives, and practices of the affiliated companies. See *National Dairy Products Corporation v. United States of America*, 350 F.2d 321 (8th Cir. 1965); *Reines Distributors v. Admiral Corporation*, 256 Fed. Supp. 581 (S.D. N.Y. 1966); *F.T.C. v. Monroe Auto Equipment Corp.*, 66 F.T.C. 276 (1964), *aff'd*, 347 F.2d 401 (7th Cir. 1965), *cert. denied*, 382 U.S. 1009 (1966); and *Alhambra Motor Parts*, 57 F.T.C. 1007 (1960), *aff'd in part, set aside in part, and remanded*, 309 F.2d 213 (9th Cir. 1962), *on remand*, 68 F.T.C. 1039 (1965).

In its findings on the "single unit" issue the district court referred to three non-Robinson Patman cases at a key point in its evaluation process. The cases cited were: *Tennessee Valley Authority v. Exxon Nuclear Company, Inc.*, 753 F.2d 493 (6th Cir. 1985)—a contract case; *Rea v. An-Son Corporation*, 79 F.R.D. 25 (W.D. Okla, 1978)—a maritime case; and *Baker v. Raymond International*, 656 F.2d 173 (1981)—a maritime case. None of these three cases should have been even considered by the court.

The Eighth Circuit apparently failed to examine the overwhelming evidence of interinvolvement and control under the test set out in its opinion and absolutely did not evaluate the evidence under the proper test. Even a cursory examination of the evidence would have disclosed total interinvolvement and control by most Cessna distributors over their affiliated dealer. In one case the evidence was undisputed that the dealer Walston controlled four distributorships. Petitioners' evidence included many of the distributor principals who totally verified petitioners' position concerning control. An example of the impact that one particular distributor (Walston) had on the Cessna distribution system is demonstrated by Appendix C. Walston was the name used by persons throughout Cessna and the industry to describe two dealerships and four distributorships. The record is replete with evidence common management, control, and guarantees of debt. At least two of the Horridge transactions were run through a Walston dealership at prices equal to or less than dealer net price paid by White Industries, Inc. The undisputed testimony of distributor D.A.D.'s principal was that he owned and totally controlled both the dealership and the distributorship. They had common financing, common employees, one common aircraft file, and common facilities.

Petitioner submits that had the Eighth Circuit evaluated the evidence in the proper light, it would have discovered the error of the trial court in its application of the law to the facts of this case.

III.

The Holding Of The Eighth Circuit Court of Appeals Is In Conflict With The Recognized Standards For Determining Liability For Horizontal Conspiracies In Violation Of The Sherman Act

A. The Law Concerning Vertical Conspiracies Is Inapplicable In This Case Since The Case Involves A Horizontal Conspiracy

The Court clearly misapplied the law concerning vertical conspiracies to the facts established in this case. There is no question about the fact that the Cessna Aircraft Company acted both as manufacturer and a distributor, performing the same functions as its independent distributors performed in the distribution chain. White Industries, for example, purchased its aircraft direct from Cessna at 20% off suggested retail price, while Cessna sold approximately 50% of its production to distributors at 25% or 26% off suggested retail.

Where a corporation is both a manufacturer and a wholesaler, and where there is evidence of an agreement between the manufacturer and its independent wholesalers with respect to price, a horizontal price-fixing conspiracy will be found to exist. *United States v. McKesson and Robins*, 351 U.S. 305, 76 S.Ct. 937, 100 L.Ed. 1209 (1956). In that case, a manufacturer who was also a wholesaler argued that the Miller-Tydings provision to the Sherman Act (15 U.S.C. § 1) and the McGuire Act (15 U.S.C. § 45) exempted the manufacturer-wholesaler from liability under the Sherman Act. The Supreme Court held that where a manufacturer competes at the "same functional level" it is not exempt from liability under the Sherman Act. *Id.* at 312, 313.

The rationale expressed by the Ninth Circuit in the case of *Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870 (9th Cir. 1982) relied upon by the Trial Court is inapposite since the record clearly discloses that Cessna performed both manufacturing and distribution roles. In *Zoslaw*, there were no dual functions. The distributor defendants were merely distributors, and therefore did not compete at the "same functional level" as the retailers with whom they were alleged to have conspired.

B. Specific Evidence Of Intent Is Not Required to Prove A Horizontal Conspiracy In Violation Of The Sherman Act

Contrary to the holding of the Trial Court, teachings of the Supreme Court make it clear that horizontal price-fixing conspiracies may exist in circumstances where the relationship of the defendants is as a supplier to others who engage in the price-fixing activity. In such circumstances, it is not necessary to find an express agreement in order to find a conspiracy. "It is enough that a concert of action is contemplated and defendants conform to the arrangement." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 142, 68 S.Ct. 915, 922, 92 L.Ed. 1260, 1285 (1948).

In *Paramount*, some of the defendants were motion picture producers as well as distributors. The Court held what was important to finding of a Section 1 violation was that the effect of the arrangements between distributors and motion picture licensees was to establish a "price structure" which regulates licensee's business. *Id.* at p. 144. In the present case, the effect of the agreement between Cessna and Walston was to stabilize the market, by reducing Cessna's inventory, clear the way

for new model introduction and allow Cessna to require the purchase of new demonstrator aircraft by each authorized dealer. The fact that Walston did not "intend" to assist Cessna in stabilizing prices in a market flooded by overproduction, or to help affect the price increases or required purchase of new model aircraft by Cessna, does not negate the existence of a horizontal combination in violation of the Sherman Act.

It is not important that price-fixing is achieved without the active or direct participation by one of the conspirators. *United States v. American Smelting and Refining Co.*, 182 Fed. Supp. 834 (S.D.N.Y. 1960). See also *United States v. Wahl Shoe Co.*, 369 Fed. Supp. 386 (D. N.M. 1974).

C. The Rule Of Reason Is Inapplicable To Plaintiffs' Claim In This Action

Evidence in this case shows that there was a contract, combination, or conspiracy between Cessna and its largest distributor, Walston, the object of which was to clean out the distribution system of year-end model aircraft. Although Cessna from time to time offered other distributors the right to purchase year-end aircraft at discounts, dealers were not given similar opportunities. Furthermore, Walston got "special" discounts, rebates and financing not made available, and in fact, kept secret from, other distributors and dealers. The purpose of these arrangements was to allow Cessna, which varied its model introduction year from time to time depending on market conditions, to introduce new model aircraft, at higher prices. New model introductions also triggered the requirement under dealer contracts for each dealer

to purchase the required number of demonstrator aircraft for the new model year.

The effect of the agreement was to keep Walston, Cessna's largest distributor, in business, and to stabilize the market and fix the price for the new models thereafter introduced. This resulted in a "squeeze" on Plaintiffs who were then forced to buy new model aircraft for demonstration purposes, and to compete with substantially lower prices for late model aircraft available in the Cessna distribution system through Walston. Under the Sherman Act, a combination formed for the purpose, or *which has the effect* of raising, depressing, fixing or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*. *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940). (Emphasis added.) An explicit agreement is not necessary as a part of a horizontal combination or conspiracy under the Sherman Act. It is of no consequence that one or more of the parties acted in its own self-interest. *United States v. General Motors Corp.*, 384 U.S. 127, 129, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966). See also, *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 791 (1978).

Price fixing is not the only conduct in restraint of trade which is prohibited by Section 1 of the Sherman Act. Where wholesalers agree to eliminate the extension of credit terms, for example, the United States Supreme Court has held that credit fixing agreements should be characterized as forms of price-fixing and come within the ambit of the *per se* rule. *Catalano, Inc. v. Target Sales, Inc.*, 466 U.S. 643, 100 S.Ct. 1925, 64 L.Ed.2d 580 (1980). A combination which imposes "unfavorable" terms on others is actionable under the Act. The com-

bination of Walston and Cessna brought about the "price squeeze" noted by Plaintiffs economist which put Plaintiffs at a competitive disadvantage.

Unfavorable terms are frequently discussed in terms of an actual or attempted boycott. The facts elicited at trial show that special financing discounts and rebates provided to Walston were not available to dealers. A boycott need not be total to be actionable under the Sherman Act. An agreement to sell at substantially unfavorable terms will suffice. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959). The mere fact that plaintiff is just one small business whose sales make little difference to the economy as a whole, do not justify tolerance of concerted or refusals to deal. Certain classes of restraints on trade are unduly restrictive and with respect to these classes, it is not necessary for the court to determine whether the restraint was reasonable or unreasonable. *Klor's, id.* at 213. Subsequent rulings have determined that a concerted boycott is unlawful *per se* no matter what the purpose. *Radiant Burners v. People's Gas, Light and Coke, Co.*, 364 U.S. 656, 81 S.Ct. 365, 5 L.Ed.2d 358 (1961); *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963); *United States v. General Motors Corp., id.* at 145.

Not only did the Cessna Walston agreements stabilize the market, but they also acted as a boycott of Plaintiffs. Plaintiffs were not offered aircraft on terms even proportionally comparative to those given to Walston. When Walston got interest free financing, Plaintiffs got no consideration, and when Walston got more than $300,000 in rebates in 1969, Plaintiffs merely received demands to purchase new demonstrator aircraft. Thus Plaintiffs

found themselves in the "squeeze" resulting from the horizontal agreements between Cessna and its largest distributor, the glut of late model aircraft on the market and the request to comply with the Cessna franchise agreement and purchase more higher priced planes.

CONCLUSION

For the reasons stated herein, petitioners respectfully request that the Court grant a Writ of Certiorari and reverse and remand this action with instructions to the Eighth Circuit to order the district court to vacate its order of dismissal and to make further findings after application of the appropriate standards of law.

Respectfully submitted,

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APPENDIX

APPENDIX A

(Filed May 6, 1988)

UNITED STATES COURT OF APPEALS,
FOR THE EIGHTH CIRCUIT

No. 87-1672

White Industries, Inc.; Eugene C. Ingram, d/b/a Carthage Airways; and Carthage Airways, Inc.,
Appellants,

v.

The Cessna Aircraft Co.; Mil Walston; Waiston Aviation Sales, Inc.; Southaire, Inc.; Dad, Inc.; Skyliners Dist. Inc.; Harold Gorrell; Aviation Activities, Inc.; and Cessna Finance Corp.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI.

Submitted: January 13, 1988
Filed: May 6, 1988

Before LAY, Chief Judge, McMILLIAN and ARNOLD, Circuit Judges.

ARNOLD, Circuit Judge.

White Industries, an authorized dealer of Cessna aircraft, brings this lawsuit against the Cessna Aircraft Com-

pany for price discrimination under §§2(a) and 2(f) of the Robinson-Patman Act, 15 U.S.C. §§13(a) and 13(f). White's suit also alleges a combination and conspiracy to violate §1 of the Sherman Act, 15 U.S.C. §1, but, as we discuss below, the Sherman Act claim is really only a variation on White's central price-discrimination theory.

This case started seventeen years ago, in 1971, when the Cessna Finance Corporation sued the White dealership over some notes it claimed were due on two aircraft White had purchased.[1] White responded with a class action brought on behalf of Cessna dealers operating from 1968 to 1974, pressing the Robinson-Patman claim now before us. After a decade of discovery and pretrial litigation, the case was tried to the District Court[2] without a jury in 1984. After the close of the evidence on the issue of liability, the Court granted Cessna's motion for involuntary dismissal of White's suit and decertified the plaintiff class. *White Industries, Inc. v. Cessna Aircraft Co.*, 657 F. Supp. 687 (W.D. Mo. 1986). White now brings this appeal from the judgment,[3] and we affirm.

I.

From 1968 to 1974, Cessna distributed the airplanes it manufactures through two different channels. It sold about half its output to Cessna distributors, who per-

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1. This collection suit was consolidated with the present Robinson-Patman countersuit by the Judicial Panel on Multi-District Litigation, *In re Cessna Aircraft Distributorship Antitrust Litigation*, 359 F. Supp. 543 (J.P.M.L. 1973).

2. The Hon. Ross T. Roberts, late a United States District Judge for the Western District of Missouri.

3. White's appeal focuses on its own claim of competitive injury. No other class members join White on its appeal.

formed a wholesaler's function by selling to contracted dealer-buyers who would in turn sell to the final consumers. Cessna sold its planes to its distributors at a 25-26% discount. Cessna also developed a second channel of distribution by organizing a number of "zone dealers," like White, to whom Cessna sold planes directly. The function of these zone dealers was parallel to that of the retail dealers who bought their planes through Cessna distributors, in that zone dealers sold their planes to end-users. Cessna sold planes to zone dealers like White at a discount of 20%.

Reduced to its simplest terms, the central theory of this lawsuit is that some or all Cessna distributors abused their wholesalers' discount by competing directly with dealers like White. According to White, these distributors sold aircraft directly to end-users, and the cost advantage the distributors enjoyed enabled them to injure competition by squeezing the zone dealers out of the market. If true, this allegation would establish that Cessna violated §2(a) of the Robinson-Patman Act by discriminating in price between distributors and dealers, where the purchasers both sold the commodities in the same geographic market and on the same functional level.

After hearing from twenty witnesses at trial plus fourteen others by deposition, and after working through over a thousand plaintiffs' exhibits, the District Court found that White had failed to demonstrate any actual injury which would justify a damage remedy under the Act. In capsule form, the Court's analysis proceeded as follows.

1. Distributors competed with dealers only when they sold directly to end-users, and White presented only twenty-nine instances of such sales during the period in question. 657 F. Supp. at 703-07, 717-18.

2. White generally failed to present evidence of collusion between commonly owned distributors and "captive" dealerships sufficient to justify attributing sales made by distributor-owned dealerships to the distributors themselves. 657 F. Supp. at 707-08.

3. An analysis of White's sales of aircraft establishes a geographic market area of 150 miles for White's sale of single-engine Cessnas, and a nationwide market for the multi-engine 402A models. After comparing White's market overlap with offending distributors, the court concluded that none of the distributors sales of single-engine planes occurred in geographic competition with White. 657 F. Supp. at 708-11.

4. White failed to prove by a preponderance of the evidence that any sales were actually diverted from White as a result of the remaining 14 proven distributor sales to end users. 657 F. Supp. at 712-15. As a result, the District Court entered judgment for Cessna.

On appeal, White claims that the trial court's order fails to state factual conclusions and legal findings and conclusions in enough detail to meet the standards of Fed. R Civ. P. 52(a). At first blush, this ground of appeal seems astonishing when urged against an opinion filling 31 pages in the *Federal Supplement*. On closer examination, it appears that White's objections to the formal sufficiency of the trial court's findings are really arguments that the trial court misapplied the law and committed clear error in finding fact.

II.

We discuss the appellant's objections following the structure of the trial court's analysis.

A. Functional Competition

White argues that the District Court's order ignores many specific examples of distributor-dealer competition presented in its narrative statement of fact, examples which White proceeds to list. White therefore concludes that the Court's order is insufficient under the standards of Rule 52(a).

Trial courts must indeed state legal and factual conclusions sufficient to give an appellate court a clear understanding of the grounds of its decision. See *Allied Van Lines, Inc. v. Small Business Administration,* 667 F.2d 751, 753 (8th Cir. 1982). This the trial court did with a remarkable degree of clarity. What Rule 52(a) does not require is a particularized finding on each piece of evidence presented by the parties. If it did, it would be impossible to adjudicate cases as complex as this one. According to White, the plaintiff's narrative statement of fact included over 8,000 separate statements occupying over 900 written pages; no rational system of civil procedure would compel a trial judge to issue 900-page opinions making 8,000 findings of fact. It is sufficient that the District Court state its decision so that the parties and reviewing court understand what it has decided and why.

A review of the evidence of distributor-dealer competition that White proffers on appeal confirms that White and the District Court are proceeding on very different legal approaches to the concept of functional competition under §2(a). White argues that any distributor sale to an entity "which is not an authorized Cessna dealer" constitutes a sale in competition with zone dealers like White. Under the District Court's analysis, distributor

sales to independent *unauthorized* dealers occurred at the distributor's proper functional level, and so such sales were not treated as competitive with dealers, whose function was to sell to end-users.

We agree with the District Court's analysis. Nothing in the Robinson-Patman Act compels a manufacturer like Cessna to impose a vertical restraint on its wholesalers' sales to limit them to "authorized" or contracted dealers. See 5 Von Kalinowski, *Antitrust Laws and Trade Regulations*, §30.02[2][a] (1988). Dealers like White who desire to compete in selling to *other dealers* will of course suffer a cost disadvantage compared with distributors, but to hold that the larger distributors' discount violates §2(a) in this circumstance would effectively abolish two-channel distribution systems in all industries.[4]

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4. White places a great deal of emphasis on its loss of the business of independent dealer Roy Horridge to distributor Walston. If Horridge had been an end-customer, this diversion would clearly have violated the Act. As a dealer, however, Horridge appears to be precisely the kind of purchaser that distributors legitimately cater to.

White objects that Horridge buys planes at the same price as White, while Horridge bears none of the costly burdens imposed on authorized Cessna dealers, like maintenance of a showroom, purchase of demonstrator aircraft, etc. Whatever the merits of White's complaint about the unfairness of independent dealers with lower overhead buying the same commodities for the same price as authorized dealers, it is clear that §2(a) does not prohibit this result. The Robinson-Patman Act proscribes discriminatory pricing, not pricing which fails to discriminate between dealers with unequal costs at the same level of distribution. Moreover, the burdens that Cessna's dealership agreement imposed on White presumably were matched by commensurate economic benefits. One may reasonably expect that authorized dealers with showrooms and other customary trappings of authorized status will be able to attract more customers interested in a stable, long-term relationship.

Finally, White makes much of the fact that Horridge had once been a customer of White's. This fact does not establish

(Continued on following page)

White cites no authority for this extraordinary interpretation of the Act, nor can we find any.

White also presses a miscellany of other evidence which tends to show distributor-dealer competition, including Cessna's use of the word "retail" to describe certain kinds of distributor sales, as well as instances of sales "passed through" subsidiary dealerships by distributors. On review, we presume that the District Court weighed the evidence before it; our review of the Court's factual findings is limited to the question of whether the trial court committed clear error. We cannot say that appellant White has presented evidence sufficient to reverse the trial judge's findings. We affirm the Court's finding that the plaintiff's proof of distributor sales to end-users extends only to the twenty-nine sales listed in the appendix to the Court's order. 657 F. Supp. at 717-18.

B. "Captive" Dealerships

The second ground of White's claim of insufficient findings involves the Court's rejection of White's theory that commonly owned dealerships and distributors functioned as the same economic entity.

We have little trouble settling this ground of appeal in the terms that White presents it. There is no question that the District Court clearly laid out its finding -

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Footnote continued—

functional competition between White and the distributor who ultimately undersold White. In general terms, a retailer who manages for a time to sell to another retailer does not thereby establish competitive injury from the wholesaler to whom his retailer-customer ultimately takes his business.

that, with one exception,[5] there was no proof that any Cessna distributor passed on the benefit of its higher discount to its subsidiary dealers. 657 F. Supp. at 707. Furthermore, the District Court left no ambiguities in its legal approach to White's arguments for disregarding the dealerships' separate corporate status or its factual findings on White's evidence. Accordingly, we see no merit in White's claim on appeal that the trial court's order violated Rule 52(a).

Again, it seems that White's appeal on this issue is really a disguised challenge to the District Court's findings of fact. A review of the evidence which White claims the Court overlooked fails to convince us that the Court's findings were clearly erroneous. White refers to several items of proof which it claims demonstrate interlocking management and centralized accounting among commonly owned distributors and dealers. We entirely agree with the District Court that none of these elements is sufficient to justify disregarding the separate corporate status of the subsidiary. 657 F. Supp. at 707. The key question for Robinson-Patman purposes is whether the relationship between distributors and "captive" dealers was so integrated that the subsidiary dealerships - which competed on the same functional level as the plaintiffs - could be taken to have purchased the planes at the higher distributors' dis-

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5. The exception involved Walston Aviation, Inc., a dealership which also controlled several distributors. The District Court found that in one instance in 1969, the Cessna discount on a "close-out" sale of planes to Walston distributors was allocated in part directly to the Walston dealership. However, the District Court found that the plaintiff dealerships had not purchased any new non-current 1969 Cessnas, and so found that the Walston dealership's constructive purchase of the bulk of Cessna's 1969 production at the distributor's discount did not represent an analogous transaction for Robinson-Patman purposes.

count. White gives us no reason to reverse the District Court's findings of fact on this issue.

C. Geographic Competition

White argues that the District Court's findings on the limited scope of White's geographic market ignore evidence in the record. Once again, this ground of appeal is mislabeled as a challenge to the sufficiency of the trial court's findings. As stated, we have no trouble affirming the District Court, since its findings on the scope of the competing entities' geographic market are unambiguously stated, and the reasons for the result are clearly developed. 657 F. Supp. at 708-11.

White's appeal on this issue really asks us to find that the evidence that White alleges has been overlooked renders the Court's findings clearly erroneous. In particular, White urges that the distributors' use of national advertising establishes every sale by distributors within White's geographic market area as a sale "in competition" with White. The problem with White's evidence is that White continues to apply its proof to its theory - which we reject - that distributors may sell only to authorized Cessna dealers. White's burden is to show distributor sales to end-users within White's geographic market, and its presentation of evidence showing distributor sales to independent dealers in White's area does nothing to carry this burden.

As a result, we find no error in the District Court's summary of distributor sales to end-users found in the appendix to its order. 657 F. Supp. at 717-18. Nor do we find error in its finding that none of the distributor sales of single-engine planes occurred in geographic competition with White. 657 F. Supp. at 708-10.

D. Actual Injury

White challenges the District Court's conclusion that it suffered no actual injury from Cessna's violations of §2(a).

White argues, first, that proof of price discrimination creates an inference of injury to competition, citing *F.T.C. v. Morton Salt Co.*, 334 U.S. 37 (1948). White's claim is well-taken, but it does not seem to challenge the District Court's opinion in any way. The District Court found that White had established a prima facie case that Cessna injured competition by selling at a discount to distributors who at times resold to end-users. As a result, the Court held, following *Morton Salt*, that White had proved that Cessna violated §2(a). 657 F. Supp. at 711-12. We cannot understand why White raises the issue of injury to competition under §2(a) on appeal, since the District Court upheld the plaintiff's position on this issue.

The fact that the plaintiff has established that Cessna's pricing practices may injure competition[6] in violation of §2(a) does not mean that White has proved that it has suffered such actual injury as a result of this violation to entitle it to treble damages under §4 of the Clayton Act. 15 U.S.C. §15. See *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 561-63 (1981).

White's proof of actual injury depended on (1) evidence from its expert economist on the tendency of lower-cost distributor sales to consumers to depress profits for zone dealers nationwide; (2) evidence of the general un-

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6. We note that Cessna may well have had affirmative defenses which could have been presented in the event that White's §2(a) claim had not been dismissed at the close of plaintiffs' case.

profitability of White's operations during the subject period; and (3) evidence of three end customers with whom White had communications who ultimately purchased from distributors. The District Court was unpersuaded by White's expert economist both because the witness proceeded on the assumption of nationwide market competition among dealers for all aircraft and because the economist's projections of adverse effect on the average Cessna dealer failed to prove any particular injury for the White dealership. 657 F. Supp. at 712-13. The general unprofitability of White's operation, similarly, did not suffice to prove to the trial court that Cessna's violation of the Act had caused any profit loss, especially in light of a recession in the aircraft industry during the period in question. 657 F. Supp. at 713. Finally, the District Court found that the three instances of distributor sales to customers with whom White had communicated did not prove that sales had been diverted from White, since the consumers' equipment needs did not match the specifications of White's aircraft, and since White had no prior dealings with any of the customers. *Id.* at 713-15. As a result, the Court held that White had failed to prove that it had suffered any actual injury from Cessna's violation of the Act, and so dismissed White's Robinson-Patman claim.

Once again, White's appeal rests on the stated ground that the Court's findings were inadequate under Rule 52(a). In light of the clarity and detail of the Court's findings, we reject this argument out of hand.

White's real objection seems to be, not that it cannot determine what the Court's findings or reasoning is, but that it disagrees with the Court's factual conclusion. Again, we review only for clear error. We do not know whether White's evidence of its business dif-

ficulties from 1968 onward would convince us of a causal connection to Cessna's violations of the Act, were we sitting as the finders of fact. We cannot say, though, that the trial court committed clear error in finding that White had failed to prove it had suffered actual injury from Cessna's violations, and we therefore affirm the court's judgment against White on its Robinson-Patman claim.

III.

The Court also rejected White's parallel claim of anticompetitive conspiracy under §1 of the Sherman Act. The Court found no evidence sufficient to prove that Cessna had combined with its distributors to exclude zone dealers from the end-consumer market for its new, current aircraft. Further, the Court held that Cessna's close-out bulk sales of non-current planes to distributors, even if it had an exclusionary effect, fell well within the rule of reason for purposes of determining antitrust liability. 657 F. Supp. at 715-16.

On appeal, White briefly recapitulates its argument below, and again labels its disagreement with the Court's factual conclusions as an appeal from insufficient findings. We cannot find any ambiguity or lack of clarity in the Court's factual findings, and White presents no reason to reject the substance of the Court's finding that no conspiracy existed between Cessna and its distributors. Accordingly, we affirm the Court's dismissal of White's Sherman Act conspiracy claim.[7]

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7. We need not reach White's appeal from the District Court's judgment dismissing White's conspiracy claims against the Cessna Finance Corporation (CFC). Even if, as White claims, CFC is only a sales tool of Cessna, White's failure to prove a right of recovery against Cessna necessarily extends to CFC as well.

IV.

White appeals the District Court's decertification of the plaintiff class, re-arguing its earlier contention that each zone dealer was commonly affected by nationwide distributor competition. Because we reject White's theory of nationwide markets for most Cessna aircraft, we affirm the District Court's findings that individual questions of fact (in this case, the extent of distributor competition with individual dealerships) predominate over common questions. Other zone dealers may well be able to demonstrate actual injury from distributor competition inside their geographic markets. This proof of liability would depend on particular facts which would vary for each dealer, and so the District Court appropriately decertified the plaintiff class, with notice to class members to permit the individual litigation of these potential claims.

The judgment of the District Court dismissing the claims of plaintiff White Industries is accordingly

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

(Filed November 19, 1975)

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Docket No. 123

IN RE

CESSNA AIRCRAFT DISTRIBUTORSHIP
ANTITRUST LITIGATION

ORDER GRANTING IN PART AND DENYING IN PART "MOTION BY CESSNA DEFENDANTS FOR DETERMINATION OF CERTAIN SPECIAL LEGAL ISSUES"

The Cessna defendants have moved for an early determination of three special legal issues under Section 1.80 of the Manual for Complex Litigation.[1] Plaintiffs have filed suggestions in opposition to defendants' motion.

The three legal issues presented for determination are, as framed by defendants:

> "1. Whether a Cessna dealer who purchases Cessna aircraft solely through an independent whole-

1. Whether an early determination of special legal issues is appropriate depends on whether such determination ". . . will expedite disposition of the cause" and whether ". . . the nature and scope of discovery and further pretrial proceedings would be substantially affected by the determination of the preliminary legal question." Section 1.80, Manual For Complex Litigation (1973).

sale distributor and makes no direct purchases from Cessna has standing to sue Cessna for alleged violations of Section 2(a) of the Robinson-Patmen Act, assuming Cessna exercises no control over the independent wholesaler's resales.

"2. Whether an independent wholesale distributor's sale of a new Cessna aircraft to a fixed base operator, lacking a Cessna franchise agreement, at dealer net prices (20% off suggested retail price) is prima facie discriminatory, under the Robinson-Patman Act, assuming such distributor also makes contemporaneous sales at the same dealer net prices of new Cessna aircraft of like grade and quality to franchised Cessna dealers.

"3. Whether concealment by an independent distributor of Cessna aircraft sales made to other than franchised Cessna dealers will toll the running of the applicable statute of limitations in respect to claims against Cessna."

For the reasons hereinafter stated, a ruling is deemed inappropriate at this juncture on the first issue tendered.

I. *Whether Cessna Dealers Purchasing Through Independent Wholesale Distributors Have a Cause of Action Against Cessna For Alleged Violation of Section 2(a) of the Clayton Act.*[2]

Cessna contends that in order to sue under Section 2(a) of the Clayton Act as amended by the Robinson-

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2. The Cessna defendants have framed the first issue in terms of the "standing" of the Cessna retailers who purchased

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Patman Act, Section 13(a), Title 15, United States Code, a party must have been a direct purchaser from the discriminating seller. Plaintiffs contend that the "direct purchaser" doctrine relied upon by Cessna was overruled by the Supreme Court in *F.T.C. v. Meyer,* 390 U.S. 341, 19 L. Ed.2d 1222, 88 S.Ct. 404 (1968), and *Perkins v. Standard Oil Co.,* 395 U.S. 642, 23 L.Ed.2d 599, 89 S.Ct. 1871 (1969).

Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act provides in pertinent part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved are in commerce . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ."

Footnote continued—

through independent distributors to sue Cessna. Standing to sue under the Clayton Act is governed by Section 4 of the Clayton Act, Secion 15, Title 15, United States Code, which provides in pertinent part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore. . . ."

See, e.g., In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir. 1973).

The issue actually presented by the first issue is whether Congress intended parties in the position of the Cessna retailers who purchased through independent distributors to have a cause of action against the one-removed manufacturer.

There is some authority supporting Cessna's contention that a party can have no cause of action under Section 2(a) unless it was an actual purchaser from the party charged with the price discrimination.[3] However, an exception to this general rule has been recognized where the buyer purchased through an intermediary whose sales policy was controlled by the seller charged with the discrimination.[4]

The Supreme Court decisions in *F.T.C. v. Meyer, supra,* and *Perkins v. Standard Oil Co., supra,* have at least cast doubt on the continuing vitality of the authority cited by Cessna. In *F.T.C. v. Meyer* the Court held that the term "customer" in Section 2(d) of the Clayton Act includes retailers who purchase through wholesalers and compete with direct buyers in resales. In *Perkins v. Standard Oil Co.,* the Court extended this flexible definition of "customers" in Section 2(d) to Section 2(a) by ruling that the term "customers" used therein was not intended to impose an arbitrary bar against recovery for "fourth level" injuries. The Court in *Perkins* emphasized that the "level" of injury was not important so long as the injured party proved a causal connection between the price discrimination in violation of the Act and the injury suffered. 395 U.S. at 648, 23 L.Ed.2d at 607.

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3. *Klein v. Lionel Corporation,* 237 F.2d 13 (3rd Cir. 1956); *Tri-Valley Packing Association v. F.T.C.,* 329 F.2d 694 (9th Cir. 1964); *Baim & Blank, Inc. v. Philco Corporation,* 148 F. Supp. 541 (E.D.N.Y. 1957). *See also dictum in: Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.,* 368 F.2d 679 (8th Cir. 1966); *National Auto Brokers Corp. v. General Motors Corp.,* 376 F.Supp. 620 (S.D.N.Y. 1974).

4. This "indirect purchaser" doctrine finds support in *Purolator Products, Inc. v. F.T.C.,* 352 F.2d 874 (7th Cir. 1965); *American News Company v. F.T.C.,* 300 F.2d 104 (2nd Cir. 1962); *Hiram Walker, Incorporated v. A & S Tropical, Inc.,* 407 F.2d 4 (5th Cir. 1969); *Skinner v. United States Steel Corporation,* 233 F.2d 762 (5th Cir. 1956).

Because the legal principles involved in determination of this first issue are in an area of rapidly developing law in which there is a substantial prospect that the legal contentions of plaintiffs may ultimately be sustained,[5] and because facts may be developed showing control of the wholesale distributors by the Cessna defendants, it is deemed inappropriate to rule on this issue at this time. Therefore, defendants' motion for an early determination of this issue will be denied without prejudice to the legal and factual contentions made therein.

II. *The "F.B.O." Theory.*

In Cessna Aircraft Corporation's system of distribution, Cessna sold both directly to Cessna franchised retail dealers and to independent wholesale distributors. Cessna did not sell directly to non-franchised fixed base operators. The independent wholesale distributors are alleged to have sold both to Cessna franchised retail dealers and to non-franchised fixed base operators (hereinafter "F.B.O.'s"). Cessna contends that because the Cessna franchised dealers and the F.B.O.'s both sell retail, the independent wholesale distributors must be on a different functional level than the Cessna franchised dealer and thus may be charged a lower price than that charged Cessna franchised dealers without violation of Section 2(a). Cessna cites cases which recognize the legality of price differentials which reflect functional differences in the chain of distribution.[6]

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5. *Cf.*: *National Dairy Products Corp. v. F.T.C.*, 395 F.2d 517 (7th Cir. 1968); *Checker Motors Corporation v. Chrysler Corporation*, 283 F.Supp. 876 (S.D.N.Y. 1968), affirmed 405 F.2d 319 (2nd Cir. 1969), *cert. denied* 394 U.S. 999, 22 L.Ed.2d 777, 89 S.Ct. 1595 (1969).

6. *F.T.C. v. Ruberoid Co.*, 343 U.S. 470, 96 L.Ed. 1081, 72 S.Ct. 800 (1952); *General Foods Corp.*, 52 F.T.C. 798 (1956);

(Continued on following page)

Plaintiffs contend that because Cessna did not sell to F.B.O.'s, in fact the Cessna franchised retailers and the independent wholesale distributors were in competition for sales to the F.B.O.'s and therefore competed on the same functional level. Plaintiffs do not take issue with the proposition that price differentials can be justified by functional differences.

The real issue is thus a factual one - whether the Cessna franchised dealers and the independent wholesale distributors competed for the same customers and thus on the same functional level. When the issue is so framed, it is apparent that there is no legal issue ripe for an early determination. Plaintiffs should be given an opportunity to utilize discovery to develop the facts concerning competition for sales to F.B.O.'s.[7]

III. *Statute of Limitations - Fraudulent Concealment.*

As framed by the Cessna defendants, the third legal issue is whether fraudulent concealment by the independent wholesale distributors of the illegal conduct charged in this action from the Cessna franchised retailers will toll the statute of limitations with respect to Cessna. Defendants assert that the "undisputed facts" show that the illegal conduct was also actively concealed from Cessna as well as from the Cessna franchised retailers; and that as a matter of law, fraudulent conceal-

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Footnote continued—

Hruby Distributing Co., 61 F.T.C. 1437 (1962); *Kirby v. P. R. Mallory & Co.*, 489 F.2d 904 (7th Cir. 1973), *cert. denied* 417 U.S. 911, 41 L.Ed.2d 215, ____ S.Ct. ____ (1974).

7. Although defendants have set forth a single transaction with respect to which it contends discovery has been completed, plaintiffs vigorously dispute that discovery has been completed.

ment does not toll the statute of limitations with respect to a defendant which was not a party thereto. Plaintiffs do not dispute defendants' legal contention; but assert that proof of defendants' involvement in the fraudulent concealment must be developed through discovery.

That fraudulent concealment will toll the statute of limitations with respect to the concealing defendant is well established. *Kansas City, Missouri v. Federal Pacific Electric Co.*, 310 F.2d 271 (8th Cir. 1962), *cert. denied*, 371 U.S. 912, 9 L.Ed.2d 171, 83 S.Ct. 256 (1962); *Public Service Co. of New Mexico v. General Electric Co.*, 315 F.2d 306 (10th Cir. 1963), *cert. denied*, 374 U.S. 809, 10 L.Ed.2d 1033, 83 S.Ct. 1695 (1963); *Atlantic City Electric Co. v. General Electric Co.*, 312 F.2d 236 (2nd Cir. 1962), *cert. denied*, 373 U.S. 909, 10 L.Ed.2d 411, 83 S.Ct. 1298 (1963); *City of Burlington, Vt. v. Westinghouse Electric Corp.*, 326 F.2d 691 (D.C.Cir. 1964). In order to establish fraudulent concealment which tolls the statute of limitations, a claimant must show:

> "(1) that *defendants* concealed the basic facts that would reveal the existence of their [illegal] behavior, and (2) that plaintiffs were ignorant of those facts through no fault of their own." (Emphasis added.)

City of Detroit v. Grinnell Corporation, 495 F.2d 448, 460 (2nd Cir. 1974); *Baker v. F. & F. Investment Company*, 420 F.2d 1191 (7th Cir. 1970), *cert. denied*, 400 U.S. 821, 91 S.Ct. 42, 27 L.Ed.2d 49 (1970). *See also*: *Wilmar Poultry Co. v. Morton-Norwich Products*, 520 F.2d 289 (8th Cir. 1975). Fraudulent concealment by some defendants does not toll the statute with respect to non-concealing defendants. Because of the nature of the

issue, plaintiffs should be given an opportunity to develop the facts concerning defendants' involvement through discovery and thereafter to file an amended or supplemental pleading of the facts before being concluded summarily on the issue of fraudulent concealment. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962).

Defendants have made various challenges to the sufficiency of plaintiffs' allegations of fraudulent concealment in the complaint. Those challenges are considered inappropriate in the context of this motion and untimely, and will not be considered herein.[8]

For the foregoing reasons, it is therefore

ORDERED that the Cessna Defendants' Motion For Determination of Special Legal Issues be, and it is hereby, granted in part and denied in part as more fully stated above.

/s/ William H. Becker
William H. Becker
Chief Judge

Kansas City, Missouri
Date: 11-19-75

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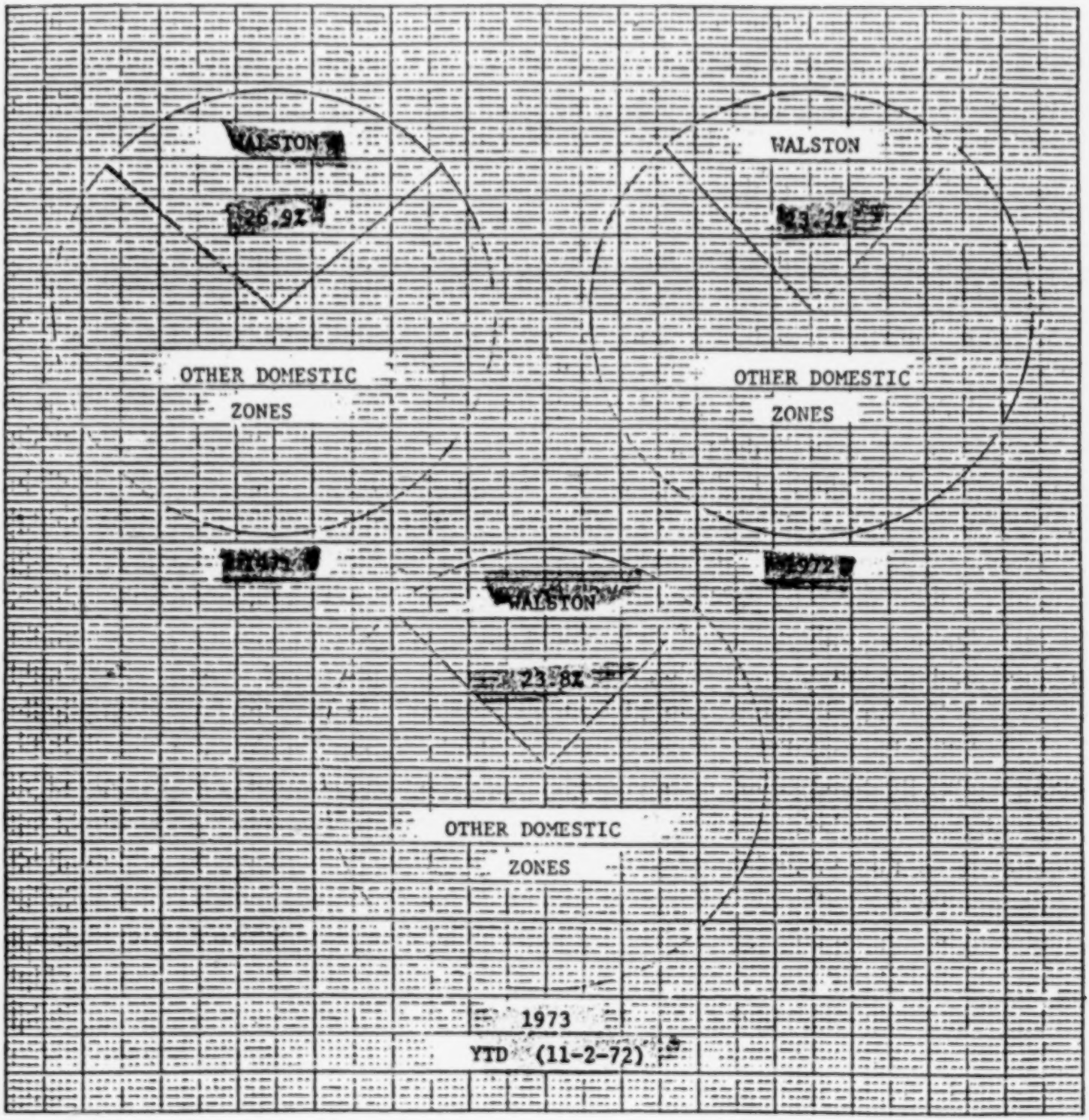
8. Defendants were denied leave to file motion to dismiss which challenged the sufficiency of the allegations of fraudulent concealment on the grounds of untimeliness by order dated November 7, 1975.

APPENDIX C

WALSTON AS A PERCENT OF DOMESTIC TOTAL

AIRCRAFT DOLLAR PURCHASES



CESSNA DISTRIBUTORSHIP ANTITRUST
LITIGATION, M.D.L.123
PLAINTIFF'S EXHIBIT NO. 570

EXH V-7

1271

1 Y 1971

	DISTRIBUTOR NAME	ZONE	UNITS	DOLLARS	
1					
2	EAST COAST ZONE	A	277	5214000	
3					
4	GREAT LAKES ZONE	B	215	4996000	
5					
6	MID ATLANTIC ZONE	C	234	5437000	
7					
8	ROCKY MOUNTAIN ZONE	D	126	3990000	
9					
10	GREAT PLAINS ZONE	E	202	4467000	
11					
12	ALASKAN AIRCRAFT	F	27	526000	
13					
14	AIRFLITE NORTH	G	113	2631000	
15					
16	AIRFLITE SOUTH	H	207	4454000	
17					
18	SKYWAYS, INC.	I	90	1738000	
19					
20	DAD, INC.	J	114	2459000	
21					
22	CAPITOL AVIATION	K	124	2487000	
23					
24	FLORIDA A/C DISTRIBUTORS	L	105	1993000	
25					
26	AVIATION ACT. + SOUTHAIRE	M	(SAME 378) 610	14878000	(SOUTHAIRE 10186000)
27					
28					
29	TOTAL		2444	55272000	
30					
31					
32					
33					
34					
35					
36					
38					
39					
40					

FY 1111

	DISTRIBUTOR NAME	ZONE	UNITS	DOLLARS	
1	EAST COAST	A	362	8579.000	
2	CHICAGO AREA	B	263	7652.000	
3	MID ATLANTIC	C	267	8424.000	
4	ROCKY MOUNTAIN	D	140	4491.000	
5	GREAT PLAINS	E	236	5493.000	
6	ALASKAN	F	40	734.000	
7	AIRFLITE NORTH	G	144	3920.000	
8	AIRFLITE SOUTH	H	316	8743.000	
9	SKYWAYS, INC.	I	175	4421.000	
10	DAD	J	203	5178.000	
11	CAPITOL	K	163	4432.000	
12	FLORIDA	L	152	4421.000	
13	AVIA. ACT + SOUTHAIRE	M	(SPAINE 368) 691	20 024.000	(SOUTHAIRE 11 199 000)
14	TOTAL		3152	86 412 000	

FY 73 Projection

Model	Weldon Units	Weldon Unit Price	Weldon Total Dollars *	Osha Domestics Units	Osha Domestics Unit Price	Osha Domestics Total Dollars
A150	4	10936	# 43744	97	8905	863785
150	87	9439	821193	1081	9571	10346251
172	83	13294	1099252	1069	13326	14245494
177	12	16245	194940	183	16373	2996259
RG	8	22054	176432	121	22736	2751056
180	8	20074	160592	69	19549	1348881
182	67	19715	1320905	677	19935	13495995
185	19	23489	446291	135	22904	3072040
206	20	26931	538620	166	28079	4661114
207	1	31463	31463	11	30897	339878
210	30	35589	1067670	252	35683	8972116
337	11	50841	559251	53	49294	2612582
P337	16	71672	1146752	76	67590	5136840
310	33	70526	2327356	149	75750	11286750
340	17	120691	2051747	89	124350	11067150
402	32	118383	3788256	84	115538	9705192
414	12	145349	1744188	53	148590	7875270
421	36	185833	6689988	126	191446	24122196
401	—	—		1	115995	115995
Total	496		# 24208642	4492		# 135054844

* Based on average FY72 actual dollar sales

** FY 1973 Unit prices per budget